UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 05-44481-rdd

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In the Matter of:

DELPHI CORPORATION,

Debtor.

- -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

June 16, 2009

10:27 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

HEARING re Doc #16411; Motion for Order Authorizing Debtors to Enter into Fourth Amendment and Fifth Amendment to Arrangement with General Motors Corporation

HEARING re Doc #16644; Motion to Authorize Expedited Motion of Deloitte & Touche LLP for an Order Terminating the Debtors' Retention of Deloitte & Touche LLP as their Independent Auditors and Accountants

HEARING re Doc #16663; Expedited Motion for Order and Amended Reclamation Procedures Order Classifying Reclamation Claims as General Unsecured Nonpriority Claims for All Purposes

HEARING re Doc #17012; Proposed Forty-Fourth Omnibus Hearing Agenda

Transcribed By: Clara Rubin

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P R O C E E D I N G S

THE COURT: Well, I presume that about two-thirds, at least, of the people are here are here on Delphi. So I'll take the Delphi case first and then move on to the other items on the calendar.

MR. BUTLER: Your Honor, good morning. Jack Butler, Kayalyn Marafioti and John Lyons here on behalf of Delphi Corporation for its forty-fourth omnibus hearing. There are three matters on the agenda. The first matter, Your Honor, is the steering option exercise motion, docket number 16410. As we indicated, Your Honor, previously, we're carrying this matter until Your Honor is able to rule on the plan modification motion that we previously filed at the final hearing for that motion. And so we'd like to adjourn this to the July 23rd omnibus hearing.

THE COURT: Okay, that's fine.

MR. BUTLER: Thank you. Your Honor, the second matter today is the final hearing on the debtors' supplemental motion for an order authorizing the debtors to amend their existing financing arrangements with the General Motors Corporation. The original motion was filed at docket number 16411. The supplement was filed at docket number 16647. Your Honor approved the interim -- this financing arrangement on an interim basis last week at docket number 16951.

There's only one objection, Your Honor, that's been

received with respect to this motion; it's a letter by Mr. Ernest Knobelspiesse, K-N-O-B-E-L-S-P-I-E-S-S-E, dated June 9th, which appeared on the Court's docket yesterday afternoon at docket number 17015. Mr. Knobelspiesse, who's a former employee of the debtors, requested that the Court defer/deny approval of the financing from General Motors, but does not set forth any basis to deny final approval of this motion as supplemented. We ask Your Honor to overrule that objection.

Your Honor, in addition, I was advised by General Motors and the United States Treasury that they wanted to address the Court in connection with this hearing.

THE COURT: On this? On the funding motion?

MR. BUTLER: Yes, Your Honor.

THE COURT: Okay.

MR. TANENBAUM: Good morning, Your Honor.

THE COURT: Good morning.

MR. TANENBAUM: Jeffrey Tanenbaum from Weil Gotshal on behalf of General Motors. Your Honor, at the end of the hearing last week I reminded the Court that our obligation to fund under the LSA is premised upon seeing an order, a plan modification order, that's reasonably acceptable to us. At that time, the Court entered the interim order. After consultation with the auto task force, Your Honor, we believe it would be appropriate if the Court deferred entry of this final order on the LSA until we see an opportunity to review --

we have an opportunity to review the plan modification order. We were not sure where the Court is with respect to that. We understand that an order was submitted. We saw letters submitted from Mr. Siegel on behalf of certain of the DIP lenders. Mr. Rosenberg submitted an order.

Your Honor, we're going to be in the position of having to review that order in any case, and we thought it would be appropriate, in the event that we do have any issues with that order, that we sort of keep both of these orders on the same time line, so to speak, and have an opportunity to review Your Honor's order in that regard before you enter the final LSA order.

THE COURT: Well, I mean, I'm not sure what posture that puts me in procedurally. I mean, GM has its rights under the agreement not to extend the financing. And I assume that if the modification order is not acceptable, then GM will so inform the debtors and there'll be discussion, and perhaps there'll be a modification of the order or perhaps there won't be. But if I just hold off signing it, then what would happen? Would we have a new hearing? I'm just not sure what --

MR. TANENBAUM: Well, Your Honor, if Your Honor does -- in the absence of Your Honor signing that order, we are in a limbo state in any event. I'm not trying to be cute with my argument at all.

THE COURT: Right.

MR. TANENBAUM: I'm trying to just put everybody in a position where it's not awkward for us. It's going to be difficult enough to receive an order and make as prompt a decision as possible. The debtors are in need of financing; everybody is totally appreciative of that fact. I don't see any downside in deferring the entry of that order because, notwithstanding the entry of that order this morning, we still cannot act, and we will not be able to act --

THE COURT: Well, the only downside, I think, is the one I identified, which is, I wouldn't know -- it's not clear to me what the next step would be with this financing motion if I had not entered the order and then GM notified the Court that it wasn't satisfied with the --

MR. TANENBAUM: Well, Your Honor, with all due respect, in the last twenty-four hours I've seen more communications with a Court than I think I've ever seen in the last thirty years. I --

THE COURT: No, I understand --

MR. TANENBAUM: I assume, Your Honor, after we see the order entered on the plan modification motion, we would immediately review it and inform chambers immediately as to what issues, if any, we had. Your Honor may still decide to enter the LSA amendment order notwithstanding, but at least at that point if things were to come to a head we could bring them to a head in that vein, which I --

THE COURT: All right, so you're not amending the LSA, then?

MR. TANENBAUM: No, we're not doing any -- making any amendments --

THE COURT: All right.

MR. TANENBAUM: -- to the LSA.

THE COURT: Okay.

All right, do Debtors have any view on this?

MR. BUTLER: Your Honor, as we advised General Motors and the auto task force prior to the commencement of this hearing, we respectfully disagree with their position. I do understand and respect the fact that they wanted to have on the record of this hearing the fact that there are conditions that are yet unfulfilled in the LSA; that means that they're not obliged to lend under the LSA. And those conditions exist under the interim order; they exist under the final order. There is no prejudice at all to General Motors, insofar as we're aware, to having the order entered and having a final determination on this motion.

Procedurally, the debtors believe that's the correct thing to do, although we're fully cognizant, and I think all the stakeholders are fully cognizant, of the conditions to the new financing. And Mr. Tanenbaum is correct; the debtors need access to the financing. We needed it last week and we needed access to the financing this week. There has to be resolution

of these matters. But I don't think, and I don't think Mr. Tanenbaum is making the argument, that GM is any way prejudiced by entry of this order.

THE COURT: Right, because the order gives GM the ability not to fund if it's not satisfied with the --

MR. BUTLER: Right. There's a condition that can either be enforced or waived in the sole judgment of General Motors.

THE COURT: Right. Well, it's, in all events, moot because I intend to enter both orders today. So I don't think there's really much of an issue. I have read the correspondence that went to me, including Mr. Tanenbaum's letter. And I assume that since that letter went out he's gotten all the correspondence that went to me. Is that correct?

MR. TANENBAUM: Yes, Your Honor. I sent by e-mail after someone had sent me Mr. Siegel's letter.

THE COURT: All right.

MR. TANENBAUM: So I'm now fully informed, I believe, unless there's something else floating around that I'm not aware of.

THE COURT: Well, I don't think so. And I could give you all my general view on the correspondence. I do not intend in this order and the bidding procedures that are attached to it to make any rulings, even implied rulings, on credit bid

issues. I think those are important issues, if they ever do come to a head, that should be addressed at that time as opposed to now.

And I think the procedures, as drafted and as commented on by the creditors' committee, are flexible enough so that someone who believes they're making a good-faith bid that is one that, with proper authorization, includes a credit bid element to it as well as another element, another element of consideration, will be able to have his or her day in court. These procedures ultimately are qualified by both fiduciary duties and the Court's duty to approve the highest and best proposal and evaluate the debtor's exercise of its business judgment.

So I don't want these procedures to be a device for constricting rights, whether those rights are creditors' rights or the debtors' rights. So I'm not going to get into the issues about the credit bidding in the procedures.

I also believe that when the debtors posit that they will be making the determination of the highest and best bidder, that's qualified by the language in the order which provides for full committee review and communication and the ultimate fact that the Court determines the highest and best result in evaluating the debtors' business judgment.

So I'm not particularly bothered by those provisions. And I believe that, again, given the fact that all of these

provisions are qualified by the debtors' duty to act as a fiduciary and the review by the committee and the ultimate review by the Court, I believe that any buyer who is interested in these assets will realize that they are not tied, as a legal matter, to the exact terms of the deal that's on the table. And I don't think the debtors would disagree with that. I think a prospective buyer would also have to understand that actual monies ultimately, I believe, are going to be involved in dealing with these assets.

So the one aspect of the proposed procedures that did give me real pause, although it may be appropriate to tweak some of the other language a little bit but not significantly, is the validation of a thirty million dollar reimbursement for Platinum. I don't believe something like that should be done without opportunity for notice and a hearing, unless it's agreed to by the primary parties in the case. I think it should bear some real -- that any sort of breakup fee or expense reimbursement should bear some appropriate correspondence to the value that the estate is getting from the party that would be getting such a stalking horse or bidder protection or reimbursement, and that it should be paid out of the proceeds of the transaction so that it's really something that clearly is for the benefit of the estate as opposed to some other party.

But I'm reluctant to pick a number based on this

record without an opportunity for notice and a hearing. I also believe that, notwithstanding the O'Brien Energy case, a bidder who eventually is outbid but has not yet gotten its protection, and I believe that there's certainly time to get it noticed for a hearing, but if for some reason that time slips by, I believe that bidder, who really does contribute by forming a template or doing due diligence that others rely on, is going to be entitled to a 503(b) type of substantial contribution payment, even if it is ultimately outbid.

So I think Platinum could take some comfort from the fact that it'll have time to put -- or the debtor will have time to put a motion in front of me for approval, focused on, again, what's the benefit to the estate of this transaction and what are the proceeds that the amount would be paid out of.

But that was my one serious problem with the procedures that were proposed.

So I hope that GM could take away from that some feeling of comfort that what it had agreed to is pretty close to what I'm prepared to approve.

MR. TANENBAUM: Your Honor, I'll defer to the auto task force, but I'm just going to make one point, and it's going to be redundant, and that is, to the extent that General Motors or the auto task force have a clarification issue or a comment on the order, it just seems fairer and a better approach to have that opportunity and to engage chambers, which

I don't think is going to delay anything, but I'll leave it at that. I just --

THE COURT: All right. I just don't want to drag it out too much. And I do know that, based on the last letter from the debtors' counsel, GM and the task force had signed off on the procedures in the order. And, again, the only thing I really have a significant issue with is the thirty million proposed fee, which frankly, given the absence of notice and an opportunity for a hearing, would be suspect if I approved it today. So it would be hard for me to believe that someone would withhold funding over something that wasn't really authorized under the Bankruptcy Code on the limited notice that we have.

MR. SIEGEL: Your Honor, Glenn Siegel for Elliott Associates. We do have one other outstanding issue, which we were only able to bring to this Court's attention this morning. We have been unable to negotiate a nondisclosure agreement with the debtor. We engaged the monitor, namely committee counsel, with respect to this document yesterday. And the monitor has at least agreed that the form that we have --

THE COURT: By "the monitor", who -- Mr. Rosenberg, right?

MR. SIEGEL: Mr. Rosenberg --

THE COURT: Okay. All right.

MR. SIEGEL: -- who has agreed that our form is, I

believe his words were, appropriate and reasonable.

I'm not asking you to do anything at this moment, but we did send Your Honor an e-mail this morning asking for you intervention to see if we could resolve this, since obviously we need to get in there and look at documents.

THE COURT: All right. Well, I don't know whether Mr. Rosenberg has a chance to talk to the debtors about this, but I'm available later this afternoon to talk about that.

MR. ROSENBERG: Yeah, we have spoken, Your Honor. I think that, clearly, the debtor continues to disagree with the draft that frankly I think, after significant changes yesterday, is now a reasonable and appropriate form. And, indeed, I believe that part of the debtors' objection goes to a point that Your Honor just ruled on, which is the credit bid issue and postponing that for another day.

So in my monitor role, I do believe that what I discussed with the Tranche C lenders yesterday, at least as represented by Mr. Siegel, does at this juncture represent an appropriate NDA. I find it kind of baffling that an issue like an NDA would ever make its way into a courtroom. You would have thought the parties could work that out fairly easily. But I am deeply concerned, given the shortness of the process, that these sorts of issues not linger on and delay the process pursuant to which higher and better value may come out of this process in a very short time frame that we all know ends in

mid-July.

THE COURT: Okay.

MR. BUTLER: Your Honor, if I can address this. First, let's be clear, and the proposed plan modification order makes clear, that the debtors are obliged to offer the same NDA that Platinum signed to other parties. Over the course of the last few days, not waiting for the plan modification order to be signed, third parties have approached the debtors, have signed the Platinum form of NDA and have access to the information.

In addition, the DIP lenders, through the protective order, have access to substantially all the information they're going to get as under the NDA. The difference in the NDA is whether you're acting as -- which hat you're wearing in terms of how you're going through it.

We found out about 10 o'clock last night on a communication from Mr. Siegel about the conversations he had had with Mr. Rosenberg, and we had not had an opportunity to speak to Mr. Rosenberg; I did so before this hearing. I provided Mr. Rosenberg nine issues that we have and a markup to show what the concerns are. I'm prepared to meet and confer with them.

But these all reflect departures that the DIP lenders want from the Platinum form. They want a better deal, a different deal, than Platinum had in terms of the NDA. They're

unwilling to sign and be governed by the same rules Platinum was. They want their own special rules. And this is not an issue, I think, where the debtors are being overzealous. We're prepared to sign the Platinum form of agreement with the DIP lenders today. They just don't want to follow the rules.

THE COURT: Well --

MR. SIEGEL: Your Honor, not to --

THE COURT: -- I --

MR. SIEGEL: -- go on ad infinitum about this --

MR. BUTLER: I didn't raise it. This is here as an omnibus issue, Mr. Siegel. You chose to bring it up.

MR. SIEGEL: Undoubtedly. The issues that Mr. Butler raises are issues that reflect the fact that we are, in fact, DIP lenders. And we think -- rather than argue it right now, we think that these are changes that are material to us and would be irrelevant to all the other parties who've signed this document. And let's just leave it at that.

THE COURT: All right, well, you all should go through it. But I -- you know, there's a general form of an NDA, and they have a well-recognized purpose. I haven't read Platinum's NDA. I didn't rule that only Platinum's NDA and no other NDA would be acceptable. But it's hard for me to say more without seeing what the specific differences are.

But, again, I -- it seemed to me that, as I said last week, the two-hat issue should be pretty limited so that the

information that's not to be provided to a bidder who also is a DIP lender in their capacity as a bidder is really limited to, again, Platinum's analysis of its deal and the debtors' analysis of the value of the Platinum deal, because that's not something you'd give to a bidder.

So -- and, again, I think that anything that shoehorns or predetermines the credit bid issues shouldn't be dealt with in this form. It should be dealt with, unless the parties agree to do it in this form, you know, if and when it ever comes up. So that's all the guidance I can give you.

MR. BUTLER: I appreciate it, Your Honor, and I think our form actually addresses those issues. I'm happy to meet and confer with people again on this --

THE COURT: Okay.

MR. BUTLER: -- but I just wanted the Court to understand that the holdup here is because the DIP lenders are not willing -- or Mr. Siegel's clients are not willing to sign the form of NDA. Even over the weekend, other prospective bidders have signed --

THE COURT: All right.

MR. BUTLER: -- and already have access to.

THE COURT: Okay, but it may be that -- well, I won't say more. I mean, it may be because the other people aren't DIP lenders. But as long as the agreement appropriately protects the debtors' information, that should be the focus.

MR. BUTLER: Thank you, Your Honor.

THE COURT: Okay. All right.

MR. BUTLER: So I think we're still back with the --

THE COURT: Well, on the financing amendment, I'll approve the debtors' motion. As you noted, it's only opposed by the letter objection by Mr. Knobelspiesse. I've reviewed that objection; it goes almost exclusively to the timing of the motion. But I believe, based on both the applicable Bankruptcy Rules as well as the facts, that the timing is appropriate here, given the debtors' need for the financing as well as, I believe, the ability of parties-in-interest to review the terms. So I'll approve it.

MR. BUTLER: Thank you, Your Honor. Your Honor, matter number 3 on the agenda is the expedited motion of Deloitte & Touche for an order terminating the debtors' retention of D&T as their independent auditors and accountants, found at docket number 16644. This matter is unopposed, and counsel for Deloitte & Touche would like to present it to the Court.

THE COURT: Okay.

MR. BESIKOF: Good morning, Your Honor.

THE COURT: Good morning.

MR. BESIKOF: Dan Besikof of Loeb & Loeb on behalf of Deloitte & Touche LLP. Deloitte's move for the formal termination of its retention as the debtors' independent

auditors and accountants -- Deloitte seeks this relief so that it and its affiliates can perform services for third parties in connection with the debtors' cases. Specifically, Your Honor, Deloitte's affiliate, Deloitte Tax LLP, has been asked to represent a potential purchaser of debtors' assets and has actually performed a small amount of preliminary work on that purchaser's behalf.

Deloitte was retained as the debtors' auditors and accountants in January 2006 to audit the debtors' 2005 financial statements and perform other related services. Deloitte's retention has completed, and its formal engagement by the debtors is no longer necessary. Deloitte completed its 2005 audit work approximately three years ago in July 2006. Since then, Deloitte's done no meaningful work for the debtors other than to issue a handful of audit consents. And the debtors have replaced Deloitte as independent auditors and accountants by retaining Ernst & Young approximately three years ago. The last work of any kind performed by Deloitte for the debtors was more than a year ago, in March 2008, in connection with the issuance of an audit consent. The debtors have informed Deloitte that they don't believe any further audit consents will be required or that any other services of any other kind will be required in the cases.

Deloitte's discussed the relief and previewed the motion with the debtor, the committee and the U.S. Trustee.

None of those parties has objected. In addition, Your Honor, the relief sought by Deloitte would not cause any prejudice to the estate; in fact, may have some benefit to the estate.

Deloitte would adhere to all applicable professional standards in connection with any third-party representation relating to the debtors and would establish appropriate confidentiality procedures to ensure that any confidential information obtained by Deloitte in the scope of its retention by the debtors is protected.

In addition, Your Honor, any confidential information obtained by Deloitte in the scope of its retention is likely stale at this point since the last meaningful work that Deloitte did on the debtors' behalf was approximately three years ago and related to fiscal year 2005.

Finally, the services to be rendered by Deloitte Tax could actually benefit the estate by assisting a purchaser or a potential purchaser of assets in preparing and submitting a bid, which would likely be of significant benefit.

Your Honor, in addition to the foregoing, section 10.3(d) of the debtors' confirmed plan, which governs the debtors' post-confirmation retention and compensation of estate professionals, already permits this relief. The provision provides that estate professionals do not need to satisfy the provisions of Sections 327 through 331 of the Bankruptcy Code in connection with post-confirmation services. Accordingly,

even if additional services were required, Deloitte would not need to remain disinterested or satisfy the other disclosure or other requirements in order to perform them.

And that's really it, Your Honor.

THE COURT: Okay.

MR. BESIKOF: I'm happy to answer any of your questions.

THE COURT: Well, I've reviewed the motion, and I'll approve the request, which is the termination of Deloitte's services. I didn't see a proposed order, so do you have one with you?

MR. BESIKOF: I do have one.

THE COURT: Okay. And I take it, given what you've just said and also what was stated in the motion, that the order doesn't contain a provision finding that whatever Deloitte does is free to do, because, obviously, Deloitte still needs to comply with the procedures that you've outlined and has whatever duties it has under applicable law.

MR. BESIKOF: Right. I think the order just provides that Deloitte is released as auditors and accountants to the debtors --

THE COURT: Okay. All right --

MR. BESIKOF: -- that it's no longer subject to disclosure requirements and that it's -- and I think that's it.

THE COURT: Okay. So I'll approve the motion, then.

MR. BESIKOF: Thank you, Your Honor. And I'll hand up an order, if I may.

THE COURT: Thank you.

(Pause)

MR. BUTLER: Your Honor, the next matter on the agenda, and the final matter on the agenda, is the debtors' expedited motion for an order under Section 546(c) in the amended reclamation procedures order classifying reclamation claims as general, unsecured, nonpriority claims for all purposes; found at docket number 16663.

THE COURT: Okay. I don't know whether everyone here on the Delphi case wants to stay for that motion. If you don't, you can be excused. Okay? All right?

MR. BERNSTEIN: Your Honor --

THE COURT: Mr. Bernstein?

MR. BUTLER: Riveted on this motion.

MR. BERNSTEIN: Can I just raise one scheduling question? Don Bernstein from Davis Polk --

THE COURT: Yes.

MR. BERNSTEIN: -- for the administrative agent on the debtor-in-possession financing, and that is that Mr. Siegel's firm has a pending request for a conference with the Court. And I know you have expressed views on the order, but also there --

THE COURT: This is the -- let me make sure I

understand the pending request. This is the one that was just discussed on their -- on the NDA?

MR. BERNSTEIN: That, I believe, is the one that's pending.

THE COURT: Okay. All right.

MR. BERNSTEIN: And the concern I have, Your Honor, as the administrative agent, is that every day that ticks by here gets us closer to events that we probably would prefer not to have to face. And what I would really like to see is some resolution of that today, one way or the other. And if the parties can't reach agreement, they may need the Court to intervene.

THE COURT: Well, I'm free, as I said, this afternoon. I think you should be able to reach agreement based on what was said today but, if not, I'm free this afternoon. I intend to enter the modification order after this hearing, so I don't think I need any more input on that.

MR. BERNSTEIN: All right. Thank you, Your Honor.

MR. BUTLER: This has been moving forward on the -- wait just a minute.

THE COURT: There are some seats there. Okay. All right.

MR. BUTLER: Moving forward on that, on the reclamation motion, Your Honor, a total of eight holders of reclamation claims have filed objections. These represent, in

the aggregate, forty-one reclamation claims. And I won't go through the list. They're all listed and docketed on the omnibus agenda.

Yesterday, the debtors filed an omnibus reply at docket number 17021 and held a meet-and-confer with counsel for the objecting parties. At that meet-and-confer, there was agreement that this motion did not present evidentiary issues and could be addressed by oral argument for the parties. I'll begin to present the motion. And counsel for, I believe, two of the objecting parties, Hitachi Chemical and JPMorgan, will present argument on behalf of the objectors. I also believe that Brazeway's counsel, whose objection raises a unique issue to that claim, will also make -- wishes to make a statement on the record.

Now, just, Your Honor, to put this in context, there were 350 reclamation claims subject to the original procedures motion. As I indicated, there are some 41 objections that are included here that -- I guess, 40 or -- I guess, 41 objections, which means there's 309 total claims that did not respond to the objection.

Originally, Your Honor, there were 855 reclamation claims, totaling 282.7 million dollars. These were reduced down to potentially now less than 350 claims with what the debtor estimates is a total of about 17 1/2 million dollars of potential liability. I think the outside number on just the

face amount of those claims is closer to about 35 million dollars. So that's really what's at issue here in terms of priority. It's no longer the larger amount.

Your Honor, obviously, with respect to the -- and just to give Your Honor a chronology here of what, I think, are relevant to this argument, back in 2005 on June 14, Delphi entered into a third amended and restated credit agreement with its prepetition secured lenders. In that agreement, they obtained a blanket lien on inventory. The debtors filed their cases on October 8th, 2005, and on October 28, 2005 the original DIP order was entered in which the prepetition secured lenders' blanket liens were subordinated to the original DIP liens but they were not released.

On November 4th of 2005, the reclamation procedures order was entered. And from a period from then through the middle of 2006, the debtors reconciled some 855 reclamation claims.

In July 2006, a reclamation creditor by the name of Speedline Technologies filed a motion for the return of reclamation goods or payment of their administrative claim. They had shipped equipment, not inventory, that was consumed. They asked the equipment to be returned. Your Honor ruled on August 17th of 2006, denied Speedline's motion and noted in that ruling that reclamation claims are potentially subject to the prior lien defense. And that particular ruling has been

commented on in a number of the objections.

There was at that time -- while Your Honor acknowledged the prior lien defense as a potential defense, you did decline the creditors' committee's request at that time to apply the prior lien defense because the prepetition secured lenders' liens had not yet been released.

We filed our original plan of reorganization the next year in September of 2007. On October 1st of that year, you entered an amended reclamation procedures process which established a mechanism for reclamation claimants to elect treatment as general unsecured creditors or litigate the prior lien defense after confirmation. That mechanism was included in the confirmed plan that was confirmed on January 25th of 2008.

Following that period, as we all know, on April 4th the plan investors, in 2008, did not close the confirmed plan. We filed plan modifications earlier this month on June 1st to move forward, and on June 5th we filed this motion to classify reclamation claims. And there were -- and one other significant event that I should also point out, which I think we'll be talking about in this hearing, is in 2007 the DIP was refinanced and the prepetition loan, the third amended and restated credit agreement, was refinanced and paid out in that transaction. And the property rights, including all the collateral rights in the inventory, were transferred to the DIP

at that time.

Your Honor, that's just a brief chronology of what has occurred here.

THE COURT: But before you get into -- I'm assuming you're going to go to the argument now.

MR. BUTLER: Yeah.

THE COURT: But before you do that, I just want to cover a couple procedural things. This is couched as a motion to reclassify, but was individual notice given to each of the reclamation claimants?

MR. BUTLER: Yes. Yes.

THE COURT: So they wouldn't have had to just look at the chart. They would have gotten their own notice --

MR. BUTLER: Correct.

THE COURT: -- that they were being reclassified?

MR. LYONS: They would have received the motion itself, Your Honor.

THE COURT: But with their name highlighted in it; that this is covering them?

UNIDENTIFIED SPEAKER: No, I don't think we --

MR. LYONS: No, we didn't have the -- no, we did not have that particular -- Your Honor, we did not have the particularized notice that we would have for an omnibus objection.

THE COURT: Okay. So I guess one issue I have is --

obviously, the people who objected had actual notice, as evidenced by their objection. I had some issue in my mind whether this would fall under 3007(d) given that it was not necessarily a claim objection, but it does seek to reclassify claims, and effectively it would value them -- seeks to value them at zero.

The other question I had is, I want to make sure I understand this, I'm assuming that at least some reclamation claimants opted into unsecured creditor treatment pursuant to the October 1 amended reclamation order?

MR. BUTLER: Yes.

THE COURT: Are those claimants covered by this motion, or are the debtors treating them as already having agreed to unsecured creditor status?

MR. BUTLER: They're covered by this motion.

THE COURT: Okay. So -- all right. Okay, so you can go ahead and --

MR. BUTLER: Your Honor, on the first part, we did not send -- we didn't treat this, under 3007(d), as a particularized notice matter as we have the others, and I guess I should -- at the front end. And this issue is, frankly, the prior lien defense; it's a legal issue that'd reply to 1 or 300 claims. I made a point of not asking the Court to enter relief, simply because people hadn't responded. Typically, we would, at the outset of these hearings, ask the Court to grant

the motion as to anyone who hadn't filed an objection. I didn't do that. I don't think it's necessary in this case, because ultimately if Your Honor's prepared to consider the merits with respect to the eight objectors and rule on the legal issue, it's applicable to everybody.

If Your Honor believes that we should send out -- you know, defer this hearing and send out particularized notice to everybody, we're prepared to do that. It's really whatever the Court wants.

THE COURT: Well, there's an alternative, which is, if I rule in your favor I could have you settle an order on five or ten days' notice. And there may be instances, there might be one even in these eight object -- in one of these eight objections, where if I rule in your favor there still might be some issue as to the amount of the claim or whether it's been agreed to or not. One of the parties raised that issue in objecting here. So there might be some merit in --

MR. BUTLER: Right.

THE COURT: -- in doing something like that.

MR. BUTLER: I don't believe we're trying to fix the amounts of claims here. This is --

THE COURT: Well --

MR. BUTLER: -- limited to one particular issue.

THE COURT: Okay. Someone said that we have a different deal with the debtor --

MR. BUTLER: Right. No, that -- I mean, you'll hear that in the Brazeway discussion.

THE COURT: Right.

MR. BUTLER: That was the unique issue that I discussed, Your Honor, earlier. Brazeway raised an issue that their reclamation claim shouldn't be on the motion because it was superseded by a cure claim --

THE COURT: Right.

MR. BUTLER: -- pursuant to the stipulation resolving the reclamation claim and the proof of claim. We have a different view of that, which is that the stipulation preserved their rights to a cure in the event the executory contracts were assumed. The original plan would have called for those to have been assumed; the modified plan does not. And therefore, as a matter of due process, they're cover -- you know, we needed to give them notice to have them covered here. We weren't going to do this -- we weren't going to have this hearing, hopefully prevail at this hearing, and then subsequently say oh, by the way, your claim which was dealt with under the original plan is being treated differently under the modified plan.

THE COURT: Right.

MR. BUTLER: That's why we gave everybody who could be covered here, who has a reclamation claim that has not been eliminated in the procedures process -- all of those

reclamation claimants were notified of this motion and this hearing date.

THE COURT: Okay.

MR. BUTLER: Your Honor, as I'll talk about in just a few minutes, I mean, the refinance DIP facility which closed -- it was approved by the Court on January 5th, 2007. Your Honor entered an order that authorized the debtors to refinance their prepetition secured debt by entering into what is the current postpetition financing facility that's governed by the revolving credit term loan and guarantee agreement.

The DIP facility was essentially a 4.5 billion dollar replacement facility, the proceeds of which the debtors used to repay the original DIP facility of 2 billion and the approximate 2.5 billion outstanding on the debtors' 2.825 billion dollar prepetition credit facility.

The prepetition credit facility was essentially rolled into the DIP facility as approximately a 2.495 billion dollar second-priority term loan. Pursuant to paragraph 11(a) of the DIP refinancing order, the debtors were authorized and directed to use the proceeds of the borrowings under the DIP facility to revocably repay in full all obligations then due and payable to the prepetition secured lenders under the prepetition credit facility and the original DIP order.

And, Your Honor, the property interest that the prepetition lenders had was simultaneously subsumed by and

belongs now to the DIP lenders. I think that's important. That's first --

THE COURT: Was it fully paid out? Is there anything left?

MR. BUTLER: No. No, it was paid out and, in fact, under paragraph 11(a) --

THE COURT: So the refinancing date occurred?

MR. BUTLER: Right.

THE COURT: Okay. All right.

MR. BUTLER: And, in fact, paragraph 11(a) of the DIP financing order specifically calls out the completion of that repayment and the release of the prepetition liens as the postpetition liens were put in place to cover that same property.

Your Honor, and, again, the -- I'm not, unless Your Honor wants me to go through it, I'm not going to go through all the legal argument in our motions and in our response. The question here really is that the objectors would like Your Honor to adopt the Phar-Mor ruling in the Sixth Circuit as opposed to the line of cases that have been adopted in this district. And Phar-Mor stands for a proposition that is not present here. They would ultimately -- they argue that you should follow Phar-Mor and not grant the prior lien defense because postpetition lenders are not good-faith purchasers to whom reclamation rights would be subordinated under Article

2-702(3) of the Uniform Commercial Code. That is simply not the law in this jurisdiction.

The two cases that have been -- that are cited most notably on this subject are In re Dana Corp. and In re Dairy Mart Convenience Stores, Inc. And I would simply say to Your Honor that the Dana case in particular is square-on; the kinds of facts here deals with a postpetition facility, in our view.

Unless Your Honor has specific questions about it, from our perspective we're really going to rely on the argument and answer any questions the objectors might raise.

THE COURT: Okay. Thanks.

MR. OLSEN: Good morning, Your Honor. Matthew Olsen of Morgan Lewis on behalf of Hitachi Chemical (Singapore) Pte.

THE COURT: Good morning.

MR. OLSEN: Your Honor, the debtors improperly seek to reclassify reclamation claims to general unsecured claims on the basis that such claims are subject to the superior rights of the DIP lenders in all reclaimed goods. As a result, the debtors contend that all reclamation claims are valueless.

The debtors' argument begins with the premise that, pursuant to UCC 2-702(3), all reclamation claims were subject to the rights of the debtors' prepetition lenders as a result of their blanket security interest and after acquired property, including inventory, although Hitachi does not concede this point, which, as maybe discussed later by counsel for Brazeway

Inc., was specifically rejected by the Sixth Circuit in the Phar-Mor Inc. case. For purposes of my present argument, I can assume that, in fact, reclamation claims were subject to the prepetition lenders' liens.

Of course, as Your Honor recognized in your bench ruling concerning the Speedline motion, the fact that reclamation claims may have been subject to the debtors' prepetition liens does not mean such claims were extinguished but only that they are held in abeyance pending the ultimate disposition of the prepetition lenders' claims.

In their motion, the debtors concede that the prepetition lenders' claims were paid in full from the proceeds of the debtors' postpetition financing on or shortly after January 5th, 2007 and not from the proceeds of the reclaimed goods. And I refer Your Honor to the motion at pages 3 and 18.

Moreover, pursuant to the express terms of the Court's final DIP order, specifically paragraph 11(a), upon repayment of the prepetition lenders' claims from the proceeds of the DIP financing, all of the prepetition lenders' liens and security interests in the debtors' assets were expressly released. They were not transferred or assumed by the DIP lenders, as was suggested by debtors' counsel. The release of this lien, of course, includes all reclaimed goods and their proceeds.

Recognizing that the prepetition lenders' liens were expressly released, the debtors contend that Hitachi's

reclamation claim is also subject to the liens granted to the DIP lenders under the final DIP financing order. Yet, the debtors conceded that the DIP lenders' liens are newly created under the DIP order and that the DIP lenders did not assume or receive a transfer of the prepetition lenders' liens.

The debtors argue that, like the prepetition lenders in acquiring their liens, the DIP lenders became good-faith purchasers of all the debtors' assets, including the reclaimed goods. But, clearly, if the DIP lenders are held not to be good-faith purchasers of the reclaimed goods or their proceeds for purposes of UCC 2-702(3), the sellers' reclamation claims would not be subject to the DIP lenders' liens.

Your Honor, the DIP lenders cannot be good-faith purchasers with respect to the goods or the proceeds subject to reclamation claims because the DIP lenders acquired their liens well after and in full knowledge of the various reclamation claims asserted by Hitachi and others.

And in our objection, we cite to the Bankruptcy Court's decision in In re Phar-Mor Inc., 301 B.R. 482 at page 497, which held that the DIP lenders there could not qualify as good-faith purchasers under 2-702(3) where such lenders had prior notice of reclamation claims.

Recognizing the importance of this point, the debtors spend almost their entire reply arguing that the DIP lenders were good-faith purchasers for purposes of the UCC. Yet, as

the debtors point out, the UCC does not define good-faith purchaser, only the separate concepts of good faith and purchaser. As their argument goes, because the DIP lenders' liens were acquired honestly, and the taking of the security interest is a purchase under the UCC, the DIP lenders must therefore be good-faith purchasers. But that approach is wrong as a matter of law. The combined term "good-faith purchaser" has a well-established meaning under applicable case law. A good-faith purchaser is one who purchases assets for value in good faith and without notice of adverse claims. And in this regard I refer Your Honor to the cases of In re Made in Detroit, Inc., 414 F.3d 576, 581 (6th Cir. 2005); In re Willemain, 764 F.2d 1019 at 1023 (4th Cir. 1985); and Greylock Glen Corp. v. Community Savings Bank, 656 F.2d 1 at 4 (1st Cir. 1981). Here, the DIP --

THE COURT: I'm sorry, what was the page for that one?

MR. OLSEN: Glen Corp. was 656 F.2d 1 at page 4. And I give you the full citations, Your Honor, because I learned of the good-faith argument as posited by Debtors for the first time in their reply. So these cases do not appear in our papers.

Here, the DIP lenders had prior knowledge of the reclamation demands prior to making the DIP loans and, thus, did not qualify as good-faith purchasers with respect to the reclaimed goods and proceeds. The debtors' argument simply

ignores the established definition of good-faith purchaser under applicable case law and the facts of this case.

In support of their arguments, the debtors principally rely on the prior decisions of this Court, including In re Arlco, In re Dairy Mart, In re Dana Corp., as well as the Sixth Circuit BAP's decision in In re Pittsburgh-Canfield Corp. However, these decisions are either distinguishable from the facts of this case or are significantly undermined by the Sixth Circuit's recent decision in Phar-Mor Inc.

The Arlow (sic) case is readily distinguishable from this case because there the Court found that all the reclaimed goods were sold and their proceeds applied in payment of the prepetition lenders' claims. And I refer to page 273 of that decision. Here, as mentioned, the prepetition lenders' claims were expressly satisfied from the proceeds of the DIP financing.

The Sixth Circuit BAP's decision in In re Pittsburgh-Canfield Corp. is unhelpful to the debtors for two reasons: First, the Court noted that the DIP lenders assumed the prepetition liens, whereas here the prepetition liens were expressly released; and, two, the decision has been flatly rejected by the Sixth Circuit Court of Appeals in Phar-Mor.

THE COURT: But not on that basis.

MR. OLSEN: Not on that basis. I think that is probably true. One point which I haven't emphasized yet, Your

Honor, and I think counsel may have brought to your attention, is that the Phar-Mor Sixth Circuit case actually goes further than Hitachi needs it to go today. It would stand for the proposition that the reclamation claimants' claims are not even subject to the prepetition lenders' claims.

THE COURT: Right.

MR. OLSEN: The approach that I think is most appropriate and which we're advancing today is that of the Bankruptcy Court's decision in Phar-Mor, which was upheld by the Sixth Circuit. It's also --

THE COURT: Well, no, the Sixth Circuit didn't deal with the Bankruptcy's Court's logic. The Bankruptcy Court said that the DIP, having taken out the prepetition liens, was not therefore a -- fell within the subject (2) language. It didn't fall within the subject (2) language because it took out the liens. And it's assumed without any citation that it wasn't in good faith.

MR. OLSEN: Well, you're referring to the Bankruptcy Court's decision, Your Honor.

THE COURT: Right, Judge Bodoh's decision.

MR. OLSEN: I don't recall specifically what citation it gave, but my understanding --

THE COURT: I don't think he gave any.

MR. OLSEN: Well, my reading of the decision was that it based it on its understanding of the definition under the

UCC. And as I mentioned earlier in my discussion, there is independent case law to support that interpretation.

THE COURT: Okay.

MR. OLSEN: It's also interesting to note that Bankruptcy Judge Bodoh of the Northern District of Ohio presided both over Phar-Mor and Pittsburgh-Canfield. And in the Phar-Mor decision he specifically distinguished the Pittsburgh-Canfield case because there the DIP lenders assumed and received the transfer of the prepetition liens, whereas in the Phar-Mor case there was an express release, as is the case here. And I refer to footnote 7 of page 497 of the Phar-Mor bankruptcy case in that regard.

The Dairy Mart decision of this Court is at least partly distinguishable from this case because although there, as here, the prepetition lenders' liens were expressly released in connection with the DIP financing, the Court emphasized that the proceeds of the reclaimed goods were applied to pay down the prepetition lenders' claim before the prepetition lenders' claims were paid in full from the DIP financing. And I refer to page 135 for that point. Thus, whether the reclamation claims were subject to the DIP lenders' security interest was not essential to the outcome of that decision.

Finally, Your Honor, the Dana decision is admittedly most directly at odds with Hitachi's argument today and the Phar-Mor decisions which we support. Though, preliminarily I

would note that nowhere in the Dana decision is it clear that the prepetition lenders' liens were released as a result of the DIP financing.

But more importantly, in characterizing the prepetition DIP financing as an integrated transaction, the Court seemingly ignored the requirement of UCC 2-702(3) that the DIP lenders must be good-faith purchasers of the reclaimed goods. That was the holding of the Phar-Mor Bankruptcy Court which the Dana Court declined to follow and which has been subsequently followed by the Bankruptcy Court in In re Georgetown Steel, 318 B.R. 340 (Distr. S.C. 2004) and, as mentioned, upheld by the Sixth Circuit Court of Appeals. And of course, Your Honor, there is no contrary law from the Second Circuit in this regard.

The Phar-Mor Bankruptcy Court correctly held that the value of the seller's right of reclamation depends on the actual disposition of the subject goods. There the Court emphasized, as is the case here, that the prepetition lenders chose to release their security interests and were paid in full through the DIP financing. The DIP lenders did not assume the liens that secured the prepetition lenders' claims, though they were free to do so, as the DIP lenders did in the Pittsburgh-Canfield case.

In sum, Your Honor, once the prepetition lenders' claims in this case were satisfied and their liens released,

the reclaiming sellers, including Hitachi, retained priority claims to any remaining reclaimed goods or proceeds therefrom, which claims are not subject to the security interests of the DIP lenders. Accordingly, the debtors' motion should be denied.

Unless Your Honor has any further questions, I'll conclude my argument.

THE COURT: This all hangs on the good-faith point, right, because the DIP agreement itself gives the DIP lenders replacement first-priority liens?

MR. OLSEN: I think that's right, Your Honor. The point is that a reclamation claim would have been made by various sellers on or after the petition date in October of 2005.

THE COURT: Right.

MR. OLSEN: Admittedly, the security interest in reclaimed goods that the prepetition lenders would have attached instantly, and that security agreement was entered into prior to the shipment of the reclaimed goods. But, in contrast, the DIP lenders came well after the fact and in full knowledge of the reclamation claims. And under the plain language of UCC 702(3), they should not be entitled to take a priority with respect to those reclaimed goods but certainly with respect to the remainder of the debtors' assets.

THE COURT: But there's a finding in the DIP order

that they acted in good faith.

MR. OLSEN: Well, Your Honor, as Your Honor's well aware, the term "good faith" is bandied about in many ways, both in the UCC and the Bankruptcy Code, and it most often means simply that one acted honestly at arm's length and is entitled to the consequences of that behavior.

But here the point is not that they acted in good faith, we wouldn't challenge that, but rather that they were a good-faith purchaser, which is a term of art which can only be defined by case law and is more akin to the notion of a bona fide purchaser under real estate law and the recording statutes, which, as Your Honor knows, one cannot be a bona fide purchaser if one has constructive knowledge of a prior recordation.

THE COURT: But, then, what do you do with the fact that they're given a first-priority priming lien?

MR. OLSEN: Well, Your Honor, I would say that certainly that primes prior liens, including the prepetition lenders if they had not been released in the first wave of DIP lenders, and that it's a good lien against all assets. But because of the specific provision of UCC 2-702(3), I do not believe that that is a priming or priority lien with respect to reclaimed goods.

THE COURT: But why?

MR. OLSEN: Simply because the language of 2-702(3)

plainly says that a reclaimed good is subject only to the rights of a buyer in the ordinary course, which clearly the DIP lenders are not, or a good-faith purchaser. It previously had said "and the lien creditor", which has now been stricken from the statute. So I believe that the DIP lenders are neither an ordinary-course buyer or a good-faith purchaser under that statute and, therefore, the reclamation sellers are not subject to the DIP lenders.

THE COURT: Well, but I guess I -- I mean, that order has long been a final order.

MR. OLSEN: Well, again, Your Honor --

THE COURT: Who -- you're saying the DIP lenders had notice of the reclamation claims but, clearly, the reclamation claimants had notice of the DIP order.

MR. OLSEN: Well, the point is the sequence of events. The reclamation claim -- the reclamation goods were shipped prior to the petition date. The demands were sent on or before ten days after the petition date. Both the original DIP lenders as well as the refinancing DIP lenders would have taken their liens and financed the estate well after the reclamation demand letters were sent and filed on the docket. And to the extent that the DIP order provides that they acted in good faith, I wouldn't challenge that. My point is that the concept of good faith in isolation is completely different or is significantly different from the concept of a good-faith

purchaser, which is a term of art which is not defined by the UCC.

THE COURT: Okay. I didn't -- you said that -- I think you said that Pittsburgh-Canfield acknowledged --

MR. OLSEN: Your Honor, it's actually the Phar-Mor Bankruptcy Court decision, which was written briefly after the Pittsburgh-Canfield bankruptcy decision. Both were written by Judge Bodoh. And if you look at footnote 7 of the Phar-Mor decision, you will find Judge Bodoh's referencing the Pittsburgh-Canfield case and acknowledging the key distinction between the two is that in Phar-Mor there was an express release of the prepetition lenders' liens, whereas in Pittsburgh-Canfield there was an assumption and transfer to the DIP lenders.

THE COURT: Well, okay. Judge Og (ph.) wrote the Pittsburgh -- Judge Bodoh wasn't part of the panel in Pittsburgh-Canfield.

MR. OLSEN: No, I agree, Your Honor. The case -- the Pittsburgh-Canfield BAP decision, which I do discuss in my argument and papers, is separate and subsequent to the Pittsburgh-Canfield bankruptcy decision.

THE COURT: Okay.

MR. OLSEN: And unless -- I could be mistaken.

THE COURT: So you're saying they were affirming Judge Bodoh?

MR. OLSEN: They were probably reversing him -- well, no, no, in Pittsburgh-Canfield the panel would have affirmed Judge Bodoh, correct, Your Honor.

(Pause)

THE COURT: Okay. And in the Phar-Mor case, Judge Bodoh doesn't discuss non-UCC law on good faith.

MR. OLSEN: I expect that's true.

THE COURT: He says -- he simply says, "No action on the part of a debtor should be permitted to defeat a seller's right to reclamation."

MR. OLSEN: I believe if you look to the last sentence of that paragraph, he will acknowledge that the DIP lenders in that case can't be good-faith purchasers.

THE COURT: Right. Okay.

MR. OLSEN: But as I had mentioned, Your Honor, the holding of that case is supported by a series of other bankruptcy- and appellate-level decisions in interpreting the definition of good-faith purchaser which cannot be found in the UCC itself.

THE COURT: Do they interpret it -- do they interpret the term in a UCC context?

MR. OLSEN: I believe they do, Your Honor.

THE COURT: Okay.

MR. OLSEN: Thank you, Your Honor.

MR. ELLIOTT: Your Honor, Bruce Elliott appearing for

Brazeway and JPMorgan Chase.

THE COURT: Good morning.

MR. ELLIOTT: I'm sure the Court is familiar with our position on this. Quite frankly, we asked not to be included in the motion once we had notice of it because our former reclamation claim has been essentially merged or has been morphed into a cure claim.

THE COURT: Well, have the debtors assumed this agreement?

MR. ELLIOTT: Well, that's a question, Your Honor. And the reason we had a problem --

THE COURT: Well, is there an order approving an assumption of the contract?

MR. ELLIOTT: There was no order approving assumption of the contract, Your Honor, but at this point in time, at best it's a conditional or a contingent reversion back to a reclamation claim. And none of those conditions have happened. And it seems to me they're putting the cart before the horse when they're including us in this motion.

THE COURT: Well, let me make sure I --

Mr. Butler, the debtors have not assumed this contract?

MR. BUTLER: No, Your Honor. It would have been assumed under the effective date of the eventual plan.

THE COURT: Okay. So if the debtors assume the

agreement, then as far as Brazeway's concerned this issue would have no bearing, correct --

MR. BUTLER: That's correct, Your Honor.

THE COURT: -- because then the claim would be paid as a cure claim.

MR. BUTLER: That's correct, Your Honor, but by way of disclosure, we included Brazeway here because under the modified plan we don't believe their contract will be assumed.

THE COURT: Okay.

MR. BUTLER: And, therefore, they have a reclamation interest. The reclamation interest was never transformed into a cure claim. I mean, ultimately the cure claim only is paid in the event the contract was assumed.

THE COURT: Okay.

MR. BUTLER: The contract was never assumed.

THE COURT: All right.

MR. ELLIOTT: Your Honor, the order -- the stipulation order says it is an agreed cure claim. That's the current condition of the claim.

THE COURT: But that's contingent upon the agreement being assumed, right?

MR. ELLIOTT: Then essentially it's being unwound. While it had -- essentially, the debtor had agreed to assume the contract. I think it was effective upon -- or upon the effective date of the plan.

THE COURT: Okay.

MR. ELLIOTT: Obviously, all the things that have happened since that time have put the matter in limbo. But at this point in time those conditions have not occurred. We're being told that the contract may not be assumed, but we don't have notice of that. All these conditions are still not fulfilled. If those conditions occur hereafter, that's one thing. And we will address those, when they are properly noticed, in an opportunity for hearing before the Court. But, Your Honor, again, I think the cart is before the horse at this time --

THE COURT: Well, but --

MR. ELLIOTT: -- with respect to this claim.

THE COURT: But let me -- I mean, let's go back to square one. Your client and other vendors asserted reclamation claims. There was always the inherent possibility that the debtor would assume those underlying contracts. That would preclude the Court from determining the reclamation claim, wouldn't it?

MR. ELLIOTT: Well, Your Honor --

THE COURT: I mean --

MR. ELLIOTT: -- the Court --

THE COURT: -- it's still a claim, so, you know, if it's an unsecured claim, it's just as a reclamation claim it would have zero dollars, on the debtors' theory. It would

still be an unsecured claim and it would still be subject to cure if the debtors determined that it was beneficial to their estate to assume the contract. So it wouldn't be premature to determine the reclamation claim.

MR. ELLIOTT: Well, Your Honor, of course, the amount of the reclamation claim was disputed, and that was the subject of our motion for reconsideration. We believe we had a bona fide reclamation claim, in the amount that was originally filed, for 572,000.

THE COURT: Right. But they're not looking for determination of amounts. They're simply saying it's zero because of the intervening or superior rights of secured creditors.

MR. ELLIOTT: Well, Your Honor, again, from the status -- a portion of our claim was deemed to be unsecured. So the Court made a determination in that, as well as it made a determination that that is a cure claim, again, subject to certain conditions. But it seems to me that the conditions -- since the conditions haven't happened, it's still a cure claim; it's still subject to further conditions that have not occurred. So that leaves us in sort of a limbo situation here. I understand the Court's, and I understand the debtors', concern about trying to deal with it as a reclamation claim as a possibility in the future, but that future is not here and not now.

THE COURT: Okay.

MR. ELLIOTT: I would just support and echo the arguments regarding the legal positions of counsel for Hitachi. It seems to me, Your Honor, that the Courts in Phar-Mor were trying to at least give some real support and some teeth to 2-702 and a reclaiming creditor, which existed, at that point in time, prior to the 2005 amendments. I think that's what we're trying to accomplish here: give the other reclaiming creditors something separate and apart from a general unsecured claim. Thank you, Your Honor.

THE COURT: Okay.

Anyone else on the claimants' side?

All right. I've read all the objections, and they lay out the views. Most of them adopt the Hitachi objection, so --

MR. BUTLER: Your Honor, I'll just take guidance from the Court. I mean, I recognize that the Phar-Mor Court found, in the Court's word, the holdings of the decisions in this district as being not practical and the reasoning not compelling. It's the only reference to --

THE COURT: Right. But, again, that's an issue that I think, although obviously the claimants are reserving for whatever appellate rights they have, I think they know pretty well where I come out on that issue because of the Speedline ruling and the like, which is that, as I think first very clearly laid out by Judge Gonzalez in the Arlco case, when you

parse through the relevant sections of the UCC, a good-faith purchaser includes a blanket lienholder. And I think, frankly, that the Sixth Circuit opinion, partially relying on a case based on a judgment lien, which is a different animal under that version of the UCC that was applicable, didn't read the provisions of the UCC appropriately and didn't recognize the rights of a blanket lienholder.

But I think their issue is more narrow, at least the issue that Hitachi's pursued at oral argument, which is that the -- it's really not the Sixth Circuit opinion but Judge Bodoh's opinion in the Phar-Mor case, which is that by releasing the lien, albeit simultaneously having a replacement lien granted to the DIP lenders, the reclamation claimants squeezed in because of the DIP lenders' knowledge of their claims. And, of course, that was also an issue dealt with by Judge Lifland and by Judge Gonzalez. But I think that's really the issue that I want to hear about.

MR. BUTLER: Your Honor, I mean, you're right. Judge Gonzalez addressed it, that very issue --

THE COURT: In Dairy Mart.

MR. BUTLER: -- in Dairy Mart at pages 135 and 136 of that opinion; Judge Lifland discussed the same issues at pages 421 and 422 of the Dana opinion; and are very clear on the point that -- and Judge Lifland was particularly focused on what the effect would be on DIP financing transactions. If you

could not -- if somehow you would be -- you would somehow create intervening reclamation rights when you have a simultaneous transaction releasing the prepetition lien and simultaneously granting the lien to the postpetition lender, it has to be viewed as an integrated transaction is what Judge Lifland says, both quoting Dairy Mart and then applying it to the facts of the Dana case at page 421 of the opinion.

And on the same page, Judge Lifland goes further and addresses the good-faith issues, found them unsupportable and unpersuasive, looking to the terms of the interim and final DIP order that were both final and unappealable and contained, as he pointed out, explicit findings of good faith on page 421 of the Dana opinion, which is -- and Judge Lifland even went on to say look, these reclamation claimants weren't, quote "lulled" by the debtors into believing they would receive administrative claims with reclamation demands.

And I think it's very clear, Your Honor -- again, at 421 of the opinion, and it's very clear in the reclamation procedures orders here the many statements made by the creditors' committee during the course of this case on this subject and that no one could look at the record of this case, either the reclamation procedures orders, the two of them that were entered, the disclosures and the debtors' prior disclosure statement, or in any other writing, and believe that this prior lien defense was not exclusively reserved throughout the entire

case. It, in fact, was -- that whole discussion was included in the disclosure statement in the original confirmed plan as well.

And just to say it, when this refinancing transaction took place at the end of 2006/beginning of 2007 -- Your Honor had approved it in January of 2007 -- the reclamation creditors had filed notices of appearance, had notice of that, and nobody objected to it. It was not opposed. And I just -- you know, I do think there are some bases to distinguish, as Your Honor has, some of the Phar-Mor reasoning. And I think this case is squarely in the sights of both Judge Gonzalez's and Judge Lifland's rulings in these three prior cases that we've cited.

That's all I have, Your Honor, unless you have other questions.

(Pause)

THE COURT: Okay, anything else?

MR. SAMBUR: May I, Your Honor?

THE COURT: Sure.

MR. SAMBUR: Thank you. Keith Sambur from Richards Kibbe & Orbe on behalf of Goldman Sachs Credit Partners LP. Your Honor, Goldman Sachs Credit Partners filed a joinder -- an amended joinder to the objection of Hitachi and JPMorgan. We obviously agree with the statements made on the record today by Hitachi. I just wanted to make one point, Your Honor, and that is, even if the reclamation claims are subject to the DIP

claims, there has been no evidence on the record and no determination of how the ultimate disposition of those claims -- or how those claims will be ultimately disposed of and whether there is value left over to be had for the reclamation creditors. I just wanted to make that point on the record. Thank you, Your Honor.

THE COURT: Well, on that point, I mean, if it turns out that the DIP loans are paid in full, then I would assume you'd move for some form of reconsideration, right, at that point?

MR. SAMBUR: That's unclear from the motion. This is a motion to reclassify. At that point -- I mean, if Your Honor's saying that --

THE COURT: Right.

MR. SAMBUR: -- those rights would be preserved and that would appear in an order, that would be one thing, although I haven't seen the order; I don't believe at this point -- or the proposed order does not state that.

THE COURT: Well, I mean, I find it hard to accept that a debtor would have to wait until it's at a -- it has a pretend closing and then makes a motion. I would think the debtor could get a ruling before then, subject, however, to the facts materially changing as to the disposition of the collateral.

MR. SAMBUR: Sure. I mean, to that point, Your Honor,

then --

THE COURT: Mr. Butler, I mean, is --

MR. BUTLER: Your Honor, actually, I think counsel's looking at the wrong transaction.

THE COURT: Well, you're saying the original --

MR. BUTLER: These reclamation claims became worthless in 2007 at the time that the refinancing took place. That's when the transfer occurred. That's when the property was transferred. The amount of the DIP claims that were transferred -- the previous debt that was transferred along with the property rights far exceeded the amount of these DIP claims, which is what the case law requires.

So the transaction that I think is relevant is the January 5, 2007 transaction. From the debtors' perspective, these reclamation claims became unsecured claims at that point in time. And the reason the debtors didn't bring a motion immediately is that we had, as Your Honor knows, in the original plan, had a different approach to treatment of these claims as we -- that plan, as Your Honor remembers, was based on a series of settlements. And the prior lien defense was preserved, but we actually approached things in a different way under that plan. That plan is now subject to modification. That treatment's not going to be afforded. And, therefore, it's the January 5, 2007 transaction that'd be relevant.

THE COURT: And let me make sure I understand that

point. The -- you're saying that the paydown of the prepetition secured debt was a sale --

MR. BUTLER: Yes.

THE COURT: -- in satisfaction there --

MR. BUTLER: Yes.

THE COURT: -- and that the amount of the debt far exceeded the --

MR. BUTLER: Yes, that's --

THE COURT: -- reclamation claims?

MR. BUTLER: That's what the transaction was in January of 2007, and that's what makes the -- and from the debtors' perspective, the -- it appropriate to get the relief on a final basis now. We talked about that, Your Honor, I think, in paragraph 47 of our original motion.

THE COURT: As the Pittsburgh-Canfield Court says, there's no question -- this is what you're arguing -- there's no question that if any of the reclamation claimants chose or were permitted to obtain possession of their goods and were required to pay the DIP lenders, or prepetition lenders for that matter, an amount sufficient to satisfy the outstanding lien at the time, that none of the reclamation claimants would have come away with any proceeds?

MR. BUTLER: That's correct, Your Honor.

THE COURT: That's your point? Okay --

MR. SAMBUR: Your Honor, if I --

THE COURT: -- what's your response to that?

MR. SAMBUR: Sure. If I may. I mean, at the time that the DIP was refinanced, there was over 2 billion dollars in excess value that the lenders placed upon the debtors' enterprise at that time. Your Honor made a point earlier that the debtors shouldn't have to wait till the end of the case in order to determine what the value of these reclamations were, and it should have been determined at that time, not now, if, in fact, they are not subject to the DIP lien. Their argument seems to be breaking down a bit. Either the reclamation liens are subject to the prepetition lien and when those were released the reclamation claim took a priority position, or they have become subject to the DIP liens which have not yet been released or satisfied. And there has not been a disposition of the collateral in any way.

THE COURT: Okay.

MR. SAMBUR: Either this is an integrated transaction and there has not been a disposition, or it's not an integrated transaction. And when those liens were released, the liens of the reclamation claims became first priority with respect to those goods that were subject to the reclamation claims.

THE COURT: Okay. What's the response to that, Mr. Butler? I mean, you could spin out a hypothetical where a debtor refinances prepetition debt with postpetition debt. And there's lots of coverage, and the debtor does so solely to

squish down the reclamation claimants. That, to me, doesn't sound particularly fair.

MR. BUTLER: Well, if the transaction was as you described, Your Honor, I'm sure at the contested hearing on that motion you wouldn't find the transaction would have been in good faith. I mean, we can spin out a lot of hypotheticals. You know, I do believe the case law makes it pretty clear it was an integrated transaction at the time. And there was, in fact, and counsel made -- they made the argument about things were released. The case law makes pretty clear what the effect of that is. But I do believe that the value -- that you measure the value -- at least our reading of the cases was you measure the value at that time for the reasons -- the same reason Your Honor discussed just a few minutes ago.

And, Your Honor, one other point I'll make is that counsel's argument seemed to be almost like he was making a marshaling argument; and we addressed that as well in our papers. And marshaling's not permitted in these circumstances, and we argue that at paragraph 43 of our motion.

THE COURT: Okay.

MR. SAMBUR: Thank you, Your Honor.

(Pause)

THE COURT: All right, I have before me a motion by the debtors that seeks an order classifying reclamation claims as general unsecured nonpriority claims for all purposes. The

motion sets forth the intersecting time lines of the reclamation claims asserted against the debtor and their treatment, as well as the incurrence of essentially blanket liens on the debtors' assets, including the goods that are covered by the reclamation claims.

The debtors had a prepetition secured credit facility which, as of the petition date, had outstanding under it in excess of 2.5 billion dollars with, for purposes of this motion, blanket liens on the debtors' property covering the goods that were delivered and subsequently formed the basis for reclamation claims covered by this motion.

The debtors early in their case obtained a debtor-in-possession financing facility; that facility added a new layer of debtor-in-possession financing on a secured basis in addition to the existing secured credit facility, which remained in place subject to the adequate protection provided for in the DIP order. Not long thereafter, the debtors also obtained approval on November 4th, 2005 of a reclamations procedures order that set forth a procedure for dealing with reclamation claims, including determining the amount of such claims and whether such claims went through the hoops of Section 546 of the Bankruptcy Code as well as Section 2-702 of the UCC applicable as to each claim. The reclamation procedures order importantly identified and preserved what the debtors defined as the prior lien defense, which is the defense

that they are now relying on in their motion.

The Court, in August of 2006, issued a bench ruling in connection with a request by a reclamation claimant for the allowance and enforcement of its reclamation claim that largely acknowledged the prior lien defense. And there were no further such requests by reclamation claimaints. Instead, the claimants and the debtors went through their reclamation procedures as set forth in a reclamation procedure order, and then subsequently the debtors obtained on October 1st, 2007 an amended reclamation procedures order that permitted reclamation claimants to opt into treatment as an unsecured creditor under the debtors' Chapter 11 plan, which was subsequently confirmed, and included that opt-in right. Many reclamation creditors did so in the view that their treatment under the plan as an unsecured creditor would be preferable to their rights as a reclamation creditor.

The debtors' plan was confirmed but has not gone effective, and in the interim the value of the debtors' business has substantially declined such that at this point the debtors, in projecting their sources and uses of cash upon emergence from Chapter 11 under a proposed modified plan, are seeking a determination that reclamation claims that have not been resolved and reclamation claims where parties had opted into unsecured creditor treatment under the confirmed plan should be valued at zero dollars given the prior lien defense.

That is, in addition to dealing with reclamation claims that have not been resolved and that that did not opt into unsecured creditor treatment, the debtors have recognized that the opt-in right was granted under entirely different circumstances and that at this point such parties would, in all likelihood, assert a reclamation claim and, projecting that possibility or predicting that possibility, the debtors have included that group also in their motion before me today.

One other important event in the time line occurred on January 5th, 2007. On that date I entered an order authorizing the debtors to obtain DIP financing and to refinance the existing DIP and the prepetition secured debt that had been also referenced in the DIP order. The reason for that request by the debtors was that they could obtain far more favorable terms for the refinancing than the amounts that they were then paying out.

Under the refinancing order, that is, the January 5th, 2007 order, which was on notice to parties-in-interest under the Court's notice procedures orders, including to all those who had filed a notice of appearance in the case, the Court granted priming liens to the DIP lenders in paragraph 6. In addition, in paragraph 11(a), the order provides:

"The adequate protection liens and other rights afforded to the Prepetition Agent and the Prepetition Secured Lenders under paragraphs 12 and 13 of the existing DIP order

shall continue in effect until the Debtors repay the amounts outstanding under the existing prepetition facility documents and the existing DIP order in accordance with this paragraph 11.

"On the Refinancing Date, the Debtors are hereby authorized and directed to use the proceeds of borrowings under the DIP credit agreement to irrevocably repay in full all obligations then due and payable to the Prepetition Agent the Prepetition Secured Lenders under the existing prepetition facility documents and the existing DIP order.

"Upon repayment of all such obligations, all liens, mortgages and security interests granted to the Prepetition Agent and the Prepetition Secured Lenders under the existing prepetition facility documents and the existing DIP order shall be deemed released and of no further force of effect, and the provisions of paragraphs 12 and 13 of the existing DIP order shall be of no further force or effect."

However, upon that date, obviously the DIP lenders, under the January 5th order, would, pursuant to paragraph 6, retain their blanket postpetition liens on a primary or priming basis.

The DIP order that I've just quoted also found that the financing was negotiated in good faith and that the DIP lenders would have the full benefit because of their good faith of Section 364(e) of the Bankruptcy Code.

The objectors to the debtors' motion make two arguments, and then one objector, Brazeway, makes a third. Let me deal with the third one first. Brazeway contends that, because the debtors entered into an agreement with it providing that the prepetition amount owed to it, including the amount owed underlying its reclamation claim, would be fixed as a cure claim under Section 365(d) of the Bankruptcy Code in the event that the Chapter 11 went effective and the underlying contract was assumed, that this motion is premature or improperly brought at this time. I don't agree with that objection. The agreement clearly has not been assumed. It could not be assumed absent a final order approving the assumption and all of the conditions to the assumption having occurred. The debtors acknowledge that if the contract is ultimately assumed and not rejected that the debtors will abide by their agreement and treat the amount owing as a cure claim that would be paid pursuant to that agreement, and that the relief that they're seeking in this motion against Brazeway would not apply.

However, I believe that the debtors, in planning their exit or emergence from bankruptcy, are entitled to have a determination under the assumption that the Brazeway contract will not be assumed and therefore that the cure claim agreement will not apply. In that instance, Brazeway would have a reclamation claim, and it is appropriate, I believe, for me at this point to determine Brazeway's rights in respect of that

claim.

The other two arguments are, first, that the prior lien defense is not a valid defense against reclamation claims. Following the logic set forth by the Sixth Circuit in Phar-Mor Inc. v. McKesson Corporation, 534 F.3d 502 (6th Cir. 2008), cert. denied, 2009 U.S. LEXIS 3134 (Apr. 27 2009), the second argument is that even if I do not follow the logic of the Phar-Mor case that I've just cited, the fact that the prepetition secured credit facility was repaid and the liens released under the January 5, 2007 DIP order would, according to the objectors, mean that there is no intervening good-faith purchaser who would take the goods that give rise to the reclamation claim with priority over them.

As far as the first argument is concerned, I have again reviewed what I believe to be the relevant case law, including not only the Phar-Mor case but a number of other decisions that I'll cite. And I continue to believe, as I did when I ruled on the Speedline reclamation claim in 2006, that proper interpretation of the relevant provisions of the UCC, which I believe Section 546(c) of the Bankruptcy Code directs the Court to, and that's particularly clear under the version of the Bankruptcy Code that existed and governs with respect to this Chapter 11 case, i.e., the pre-BAPCPA version of the Code, that a lien creditor with a blanket security interest that includes the goods that give rise to the reclamation claim

does, in fact, take with a superior right to the reclamation claimant. And if, in fact, the value of that lien leaves nothing for the reclamation claimant, then the reclamation claim should be viewed as one that has a zero value, and that it should, as the debtors seek in this motion, therefore be treated as a general unsecured claim in its allowed amount.

The rationale for that conclusion is set forth at length in three cases from this district: In re Arlco Inc., 239 B.R. 261 (Bankr. S.D.N.Y. 1999); In re Dairy Mart Convenience Stores, Inc., 302 B.R. 128 (Bankr. S.D.N.Y. 2003); and In re Dana Corporation, 367 B.R. 409 (Bankr. S.D.N.Y. 2007). The Dana Corporation case is under BAPCPA, but the logic on this issue applies equally to pre-BAPCPA cases. This is also the view of the leading treatise on bankruptcy, as it appears at 5 Collier on Bankruptcy, paragraph 546.04[a][7]. See also In re Pittsburgh-Canfield Corporation, 309 B.R. 277 (BAP 6th Cir. 2004); and In re Advanced Marketing Services, Inc., 360 B.R. 421 (Bankr. D. Del. 2007).

Clearly, as Judge Gonzalez set forth in the Arlco decision, first, Section 546(c) of the Bankruptcy Code is not intended to increase any rights that a creditor would have outside of bankruptcy. Rather, it refers the Court to applicable nonbankruptcy law with regard to the rights of reclamation creditors. UCC Section 2-702(3) provides that the right to reclamation is "subject to the rights of a buyer in

ordinary course or other good faith purchaser under this Article," and then it has, in parentheses, "(Section 2-403)."

In nine of the states where the debtor does business, the UCC provision that I've just quoted also recognizes the rights of, quote, "other lien creditors" as well as buyers in the ordinary course or other good-faith purchasers.

As Judge Gonzalez notes in Arlco, Section 2-403 does not define good faith or purchaser. However, Section 1-201 of the UCC defines good faith as "honesty in fact in the conduct or transaction concerned", which is further refined. We're dealing with a merchant which requires observance of reasonable commercial standards of fair dealing in the trade.

Section 1-201(33) defines purchaser as one who "takes by purchase", and purchase includes, among other things, a mortgage, pledge, lien or other voluntary transaction creating an interest in property. Therefore, if one goes back to Section 2-403, applying those terms, the definition of purchaser is broad enough to include an Article 9 secured party.

I believe, therefore, and, again, based on the logic of the Arlco decision, that reclamation creditors took subject to the rights of the prepetition secured lenders who had a lien on their goods as well as substantially all of the debtors' other property. The Arlco decision also stands for the proposition that such secured creditors are not required to

marshal their property in asserting their rights and remedies for the benefit of reclamation creditors.

I believe that the Phar-Mor case unfortunately ignores that statutory foundation and relies largely upon a case premised upon an earlier version of the UCC: In re Mel Golde Shoes, Inc., 403 F.2d 658, which dealt with not a mortgage lien creditor but a judgment lien creditor and took that holding and applied it, I believe, improperly to -- or incorrectly to a mortgage lien creditor.

It also found that there was a trust relationship between a debtor and a reclamation creditor, notwithstanding the absence of any trust language in the UCC, or the relevant provisions of the UCC, and the definitions that I just went through. Moreover, it appears to overlook the fact that under the UCC, in Section 2-403, quote, "A person with voidable title has power to transfer a good title to a good faith purchaser for value." And value includes rights acquired as security for a preexisting claim.

So I believe that it's appropriate to follow the logic of the several cases I have cited and not to follow the logic of the Phar-Mor case and, therefore, to recognize the validity of the so-called prior lien defense.

That still leaves the issue of whether the replacement by the debtors, with the consent of the existing secured lenders, in the January 5th refinancing order enabled the

reclamation claimants to have a superior right to the liens and claims of the DIP lenders and, therefore, not to be subject anymore to the prior lien defense. This issue has been dealt with by a number of bankruptcy court-level decisions. It is the view of the editors of Collier that the prior lien defense can arise from either a pre- or postpetition transaction and may encompass both pre- and postpetition collateral, although they recognize that at least one case goes the other way. Again, see 5 Collier on Bankruptcy, paragraph 546.04[a][7].

The primary case relied upon by the objectors is the underlying bankruptcy court decision in In re Phar-Mor Inc., 301 B.R. 482 (Bankr. N.D. Ohio 2003). That decision ultimately was overruled not on this point but on the general acceptance of the prior lien defense by the Sixth Circuit Phar-Mor decision that I've cited. That decision, because it didn't recognize the prior lien defense, did not then go on to discuss the Bankruptcy Court's ultimate ruling which is relevant here. In its ultimate ruling, the Bankruptcy Court in the Phar-Mor case, after acknowledging the validity of the prior lien defense, determined that the defense would not apply under the present circumstances because, similar to the present facts, the debtor had entered into a DIP agreement which was approved by a DIP order, pursuant to which the prepetition lenders were paid off and their liens deemed released. And the DIP order gave the debtors authority to grant new liens with

superpriority to the DIP lenders.

The Bankruptcy Court concluded that the new DIP lenders did not, through their blanket liens, trump the interests of reclamation creditors. The rationale for that conclusion is set forth at page 497 of the decision. And it's stated in three ways. First, the Court says the debtor's decision to grant a security interest in inventory to a subsequent secured lender "cannot defeat a seller's reclamation rights if the seller asserted its rights before the security interest is granted," since, as the Court believes, "no action on the part of a debtor should be permitted to defeat a seller's right to reclamation."

It's not clear to me that this grant would necessarily defeat the right to reclamation since, immediately before the grant of the lien, the right to reclamation, as recognized by the Court, was worthless given the existence of the prepetition lien.

In addition, notwithstanding the Court's reference to subsequent secured lenders, an emphasis just below, then, that the interest to which reclamation claimants may be subservient must be a prior secured lien. The statute itself does not refer to the rights of prior good-faith purchasers; rather, it says "other good-faith purchasers".

In addition, the Court states, in one sentence without support, "Having notice of the reclamation demands, the DIP

lenders cannot qualify as good-faith purchasers under Section 2-702(3)."

The objectors would have me read into the definition of good faith and purchaser under the UCC, as I previously summarized and as summarized in the Arlco case, the definition of -- or the concept of prior notice generally. I, however, believe that, under the present facts, that reading would be inappropriate. I do so for two reasons. First, I believe that the logic on this issue set forth by Judge Lifland in In re Dana Corporation, where he specifically addresses the Bankruptcy Court Phar-Mor case on this point, is well taken and that the replacement and satisfaction of a prepetition blanket security interest by a postpetition blanket security interest renders the reclamation claims for those goods valueless. That analysis is found at 367 B.R. 419 through 421. He cites, appropriately, In re Dairy Mart Convenience Stores Inc., 302 B.R. 128 at page 135 through 136 on this point.

Moreover, it appears to me that the refinancing DIP agreement and the proposed order approving it was on more than sufficient notice and as a final order at this point. And it gives the DIP lenders valid, perfected, enforceable liens on the refinancing date on substantially all of the debtors' assets, including the assets that would give rise to the reclamation claim of each of the objectors.

In light of that fact and in light of the specific

good-faith finding by the Court in that order, it would appear to me that that order should trump the objectors' notice argument -- they too had notice and did not object to this order, which I view to be binding -- and give rise to the very type of good-faith lien that I've already concluded would be superior to the reclamation interest of the objectors.

As Judge Lifland determined in Dana Corporation, "Because the reclaimed goods or the proceeds thereof were either liquidated in satisfaction of the Prepetition Indebtedness or pledged the DIP Lenders pursuant to the DIP Facility, the reclaimed goods effectively were disposed as part of", and here I would substitute in "the refinancing date payment", "of the Prepetition Credit Facility. Accordingly, the Reclamation Claims are valueless as the goods remained subject to the Prior Lien Defense." 367 B.R. at 421.

A similar point was made in the Pittsburg-Canfield case, which pointed out at page 288 that no repossession of the goods under these facts would have prevented the requirement of satisfying the outstanding liens as existed here.

Ultimately, again, I think that what I'm being asked to do is marshal the assets rather than recognize the fact that they've been, in essence, purchased by the existing DIP lenders under the January 2007 order.

So for those reasons, I'll grant the debtors' motion. As I said at the beginning of this argument, I had some concern

that this motion would fall into the category of an omnibus claim objection in that it is, in effect, an objection to the reclamation claims, although it seeks simply the reclassification of those claims given that they would have zero value as reclamation claims, and therefore it would be subject to Rule 3007(d) of the Bankruptcy Rules, which it does not appear to me has been satisfied here given the nature of the notice.

So I will ask the debtors to settle a copy of the order -- or the proposed order individually on the reclamation claimants who appear on the exhibit to the motion, and inform them that, unless an objection is entered -- I'm sorry, filed and served within ten days of the settlement, the order will be entered. The notice can inform them of my ruling.

Hopefully the transcript will be out fairly shortly. But, obviously, this is notice of settlement after the order is -- the Court has entered a ruling.

MR. BUTLER: Your Honor, just so the record is clear, then, on the -- I'm assuming in that notice of settlement you want us to use the particularized form of notice --

THE COURT: Yes --

MR. BUTLER: -- that we've used before?

THE COURT: Yes, please.

MR. BUTLER: We shall, Your Honor.

THE COURT: Okay.

MR. ELLIOTT: Your Honor, one other thing with respect to the Brazeway claim, Your Honor's not making a decision here in resolution of the amount of the reclamation claim, is that correct?

THE COURT: That's right. The debtors are not seeking anything today other than -- well, when you say "the amount", the reclamation claims that are covered by this motion, as reclamation claims, have zero dollars -- zero value, zero dollar value. As a cure claim, that's decided pursuant to your separate order or agreement. Is that clear?

MR. ELLIOTT: Well, Your Honor, a motion was filed indicating that the resolu -- or the cure amount was resolved, which it's not. And that's -- I just want to make that clear on the record.

THE COURT: Well, the cure amount --

MR. ELLIOTT: I'm sorry, I'm sorry, the reclamation claim --

THE COURT: As a reclamation claim.

MR. ELLIOTT: The reclamation claim amount.

THE COURT: Correct, but -- so I'm not determining it's dollar Y or dollar X because I don't have to because I determined it has no value.

MR. ELLIOTT: Thank you.

MR. OLSEN: Your Honor, Matt Olsen for Hitachi. Did you say that the order would not be entered until after the

ten-day notice period with respect to the settlement --

THE COURT: Correct.

MR. OLSEN: -- or that it will be entered today contingent upon objections?

THE COURT: No, it's going to be settled on the parties. So it'll be entered only after the notice of settlement period expires.

MR. OLSEN: Okay. Thank you, Your Honor.

MR. BUTLER: Thank you, Judge. That's all we have for Delphi today.

THE COURT: Okay. Thank you.

(Proceedings concluded at 12:32 PM)

I N D E X

R U L I N G S

C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true and accurate record of the proceedings.

Clara Rubin

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Date: June 18, 2009